

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES SPROATT, ALICE POSLEY
and MICHAEL SEIY

Appeal No. 2002-2227
Application No. 09/522,545

HEARD: March 11, 2003

Before ABRAMS, FRANKFORT, and McQUADE, Administrative Patent Judges.
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claim 24.
Claims 1-5, 8-11, 20, 21, 25 and 26 have been allowed, and claims 6, 7, 12-19, 22 and 23 have been canceled.

We REVERSE.

BACKGROUND

The appellants' invention relates to an apparatus for automatically leveling a vehicle. Claim 24 appears in the appendix to the Brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Hamilton	4,913,458	Apr. 3, 1990
Fukumoto	5,580,095	Dec. 3, 1996

Claim 24 stands rejected under 35 U.S.C. § 103 as being unpatentable over Fukumoto in view of Hamilton.¹

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejection, we make reference to the Answer (Paper No. 12) and the final rejection (Paper No. 6) for the examiner's complete reasoning in support of the rejection, and to the Brief (Paper No. 11) and Reply Brief (Paper No. 14) for the appellants' arguments thereagainst.

OPINION

¹On page 9 of the Answer the examiner asserts, for the first time, "upon further review of the Hamilton Patent, Examiner has identified Hamilton to be a straight 102 rejection over the Applicant's claim 24." 37 CFR 1.193(a)(2) prohibits the examiner from entering a new ground of rejection in the Answer except under certain circumstances, which are not present in the instant situation. Therefore, we shall consider the quoted statement regarding anticipation to be a gratuitous comment by the examiner, and not a ground of rejection.

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

Claim 24 stands rejected as being unpatentable over Fukumoto in view of Hamilton. It is the examiner's view that Fukumoto discloses all of the subject matter recited in the claim except for the requirement that "the controller causes the legs to retract to move the vehicle downwardly relative to the ground surface, until the orientation of the vehicle reaches the reference level plane" (Paper No. 6, page 3). However, the examiner is of the view that one of ordinary skill in the art would have found it obvious² to provide the Fukumoto controller with such a feature in view of the teachings of Hamilton, "in order to allow for faster and lower leveling of a vehicle" (Paper No. 6, page 3). The appellants argue that the structure missing from Fukumoto

²The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill in the art. See, for example, In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a prima facie case of obviousness, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1439 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988).

is not taught by Hamilton, and therefore combining the two references would not result in the invention recited in claim 24.

Claim 24 recites an apparatus for automatically leveling a vehicle comprising a plurality of extendable and retractable legs mounted to the vehicle, a sensor mounted to the vehicle to sense pitch and roll of the vehicle relative to a reference level plane and to produce an orientation signal representing the pitch and roll, and a controller coupled to the legs and the sensor. The dispositive issue in this case is whether in the Hamilton vehicle leveling system the operation of the controller is such that it

monitors the orientation signal received from the sensor and in response to that signal the controller causes at least one of the legs to both extend to move the vehicle upwardly and retract to move the vehicle downwardly relative to the ground surface, until the orientation of the vehicle reaches the reference level plane within a tolerance,

as is required by claim 24. In this regard, in response to the final rejection the appellants argued that the language of claim 24 requires the inventive controller to cause the legs to both extend and retract in the course of seeking the point at which the vehicle is leveled, whereas the Hamilton controller causes the legs to extend only to achieve that result (Brief, pages 12-14). In the Answer, the examiner added to the statements made in the final rejection the further assertion that Hamilton also discloses an "inverse logic" system for re-leveling the leveled vehicle, in which the controller is programmed to both extend and retract the legs. The examiner makes reference to

Hamilton at column 24, line 68 et seq. as disclosing this phase of operation, which allegedly teaches the “retract” feature of the claim (Answer, pages 6 and 7).

In response to this new theory, the appellants filed a Reply Brief in which they disputed in great detail the examiner’s interpretation of the noted passages of Hamilton. They also submitted an affidavit from Mark Eichhorn,³ with an accompanying DVD demonstration disk (Paper No. 16), as evidence in support of the appellants’ position that the Hamilton controller does not operate in the manner professed by the examiner in either mode of operation. While the examiner initially refused to enter the affidavit and the DVD disk (Paper No. 17), upon the appellants’ filing of a petition on the matter, it was “considered and entered” (Paper No. 19). The essence of the appellants’ arguments is that (1) analysis of Figures 9 and 13 of Hamilton lead to the conclusion that the initial leveling in the Hamilton system is accomplished solely by extending the legs, and not by both extending and retracting the legs, and (2) the “inverse logic” system of Hamilton which is used in re-leveling the vehicle would not have taught one of ordinary skill in the art to retract the legs. Mr. Eichhorn’s affidavit and DVD are in support of the conclusions expressed in the arguments.

We find ourselves in agreement with the appellants’ explanations of both of the Hamilton operating modes. We arrive at this conclusion with regard to initial leveling for

³We note that Mr. Eichhorn states on page 2 of his affidavit that he is a “named inventor” on the present application, however, this is not reflected in the record.

the reasons set forth on pages 12-14 of the Brief, noting that the examiner apparently has abandoned the position taken in the final rejection (Paper No. 6) inasmuch as the examiner admits on page 6 of the Answer that “[d]uring this initial leveling all jacks are extended.” We base our agreement with the appellants position on the matter of re-leveling on the explanation provided in the Eichhorn affidavit as to why the Hamilton system will not operate in the manner suggested by the examiner. In this regard, we point out that although the examiner has “considered” this evidence, no discussion of it has been provided by the examiner and, most notably, no explanation has been provided as to why the examiner’s position should stand in the face of it. The examiner’s inaction results in the appellants’ evidence standing unchallenged and unrebutted on the record.

For the above reasons, it is our opinion that the combined teachings of Fukumoto and Hamilton fail to establish that the subject matter recited in claim 24 would have been obvious to one of ordinary skill in the art, and we will not sustain the rejection.

CONCLUSION

The rejection of claim 24 is not sustained.

The decision of the examiner is reversed.

NEAL E. ABRAMS
Administrative Patent Judge

CHARLES E. FRANKFORT
Administrative Patent Judge

JOHN P. McQUADE
Administrative Patent Judge

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600 ONE SUMMIT SQUARE
FORT WAYNE, IN 46802